# Iowa Department of Natural Resources
# Environmental Protection Commission

**ITEM** **12** **INFORMATION**

**TOPIC** **Proposed Rule: Chapters 21, 22, 23, 25 and 34: Air Quality Program Rules – Rescission of vacated federal regulations**

The attached Notice of Intended Action to amend Chapter 21 “Compliance,” Chapter 22 "Controlling Pollution," Chapter 23 "Emission Standards for Contaminants," Chapter 25 “Measurement of Emissions,” and Chapter 34 “Provisions for Air Quality Emissions Trading Programs” of the 567 Iowa Administrative Code is being presented to the Commission for information.

The purpose of the proposed rule changes is to remove from the state air quality rules federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court include: the Clean Air Interstate Rule (CAIR), the Clean Air Mercury Rule (CAMR), the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Boilers and Process Heaters (the Boiler MACT), and the NESHAP for Brick and Structural Clay Products Manufacturing (Brick-Clay MACT).

Over the last year and a half, the D.C. Court has issued rulings on several significant federal programs promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. The vacaturs of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air agencies. Please see the attached background document for more information on the vacated federal regulations, the D.C. Court decisions, and the impacts of the vacaturs on the Department and on stakeholders.

In response to these vacaturs, the Department is proposing to remove the now vacated federal regulations that were adopted by reference. The specific rule amendments being proposed are explained in the preamble of the attached Notice. The Department plans to bring this Notice to the Commission for decision at the Commission's November meeting.

Christine Paulson
Environmental Specialist Senior
Program Development Section, Air Quality Bureau
Memo date: September 22, 2008

**ENVIRONMENTAL PROTECTION COMMISSION [567]**

**Notice of Intended Action**

Pursuant to the authority of Iowa Code section 455B.133, the Environmental Protection Commission hereby gives Notice of Intended Action to amend Chapter 21, "Compliance," Chapter 22, "Controlling Pollution," Chapter 23, "Emission Standards for Contaminants," Chapter 25, "Measurement of Emissions," and Chapter 34, "Provisions for Air Quality Emissions Trading Programs," of the Iowa Administrative Code.

The purpose of the proposed rule changes is to remove from the state air quality rules federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court include: the Clean Air Interstate Rule (CAIR); the Clean Air Mercury Rule (CAMR); the National Emission Standards for Hazardous Air Pollutants (NESHAP) for industrial, commercial and institutional boilers and process heaters; and the NESHAP for brick and structural clay products manufacturing.

Over the last year and a half, the D.C. Court has issued rulings on several significant federal programs promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. The vacaturs of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air agencies.

Although the D.C. Court vacated the federal regulations, the regulations were adopted by reference and therefore are still in effect and enforceable by the Department. The CAIR and CAMR programs are intended to reduce pollutant emissions from electrical steam generating

units (EGUs) at the regional and national levels and were based upon participation in EPA-managed emissions trading programs. Now that the federal regulations are vacated, EPA will not be running the trading programs thereby negating the need for Iowa to retain the associated federal regulations.

The D.C. Court also vacated EPA's air toxics regulations under the NESHAP program for industrial, commercial and institutional boilers and process heaters, and for brick and structural clay products manufacturing. These regulations are more typically referred to as the "Boiler MACT" and the "Brick MACT" because the NESHAP program includes establishing Maximum Achievable Control Technology (MACT) for these source categories. The Department is proposing to remove the now vacated Boiler MACT and Brick MACT from state air quality rules.

During the rulemaking process, the Department will continue to closely monitor EPA and federal court actions regarding the vacated federal standards, and, if needed, will alter its proposed rulemaking and implementation strategies.

Item 1 rescinds subrule 21.1(4) to remove the emissions inventory provisions of CAIR. The Department is removing these provisions because the D.C. Court's vacatur included the emissions inventory requirements of CAIR.

Item 2 amends rule 567—22.120(455B) to state that the federal Acid Rain program definitions that reference CAIR are not adopted by reference. When EPA promulgated the CAIR program, it also modified the Acid Rain program. The D.C. Court vacated the CAIR program, but the Acid Rain program remains in full force and effect.

Item 3 amends paragraph 23.1(2)“z,” standards for electric utility steam generating units (EGUs) to remove the provisions associated with CAMR for mercury emissions for coal–fired units constructed or reconstructed after January 30, 2004. The Department is removing these provisions because the D.C. Court vacated the federal CAMR program.

Item 4 amends subrule 23.1(4) to rescind the text noting that the standards for mercury emissions from electric utility steam generating units (EGUs) are set forth in subrules 23.1(2) and 23.1(5), and in 567—Chapter 34. This rulemaking removes the federal CAMR provisions from state rules, so this cross reference will no longer be correct when this rulemaking is adopted.

Item 5 amends paragraph 23.1(4)”dd,” which adopts by reference the federal provisions for the Boiler MACT. The amendment removes of most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Boiler MACT. The amendment also includes a footnote explaining the vacatur and indicating that the federal regulations under Subpart DDDDD are no longer adopted by reference. The paragraph is being preserved as a placeholder because EPA is required to re-promulgate the Boiler MACT, and may do so under the same federal subpart.

Item 6 amends paragraph 23.1(4)”dj,” which adopts by reference the federal provisions for the Brick MACT. The amendment removes of most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Brick MACT. The amendment also includes a footnote explaining the vacatur and indicating that the federal regulations under Subpart JJJJJ are no longer adopted by reference. The paragraph is being preserved as a placeholder because EPA is required to re-promulgate the Brick MACT, and may do so under the same federal subpart.

Item 7 rescinds paragraph 23.1(5)”d” which contains a cross reference to the emission guidelines for mercury for coal-fired EGUs. The emission guidelines are a component of the federal CAMR program, which was vacated by the D.C. Court. Since this rulemaking will rescind the provisions in Chapter 34 that are referenced in this paragraph, the cross-reference will no longer be correct and is being rescinded.

Item 8 rescinds rule 567—25.3(455B). This rule adopted by reference the provisions for continuous emissions monitoring for CAMR. This rule is being rescinded because the D.C. Court vacated the federal CAMR program.

Item 9 rescinds rules 567—34.2(455B) through 567—34.308(455B), including Tables 1A, 1B, 2A, 2B, 3A and 3B. These are the provisions of the CAIR and CAMR programs adopted to implement the federal requirements for these programs, including allocation of emissions allowances. As explained previously, the D.C. Court vacated the federal CAIR and CAMR programs in their entirety. A footnote is being added that explains the vacatur and indicates that the federal provisions for CAIR and CAMR are no longer adopted. Chapter 34 and rule 567—34.1(455B) are being retained as placeholders for future air emissions trading programs.

These amendments are intended to implement Iowa Code section 455B.133.

The following amendments are proposed.

**ITEM 1.** Rescind subrule 21.1(4).

**ITEM 2.** Amend rule 567—22.120(455B), introductory paragraph, as follows:

**567—22.120(455B) Acid rain program—definitions.** The terms used in rules 22.120(455B) through 22.147(455B) shall have the meanings set forth in Title IV of the Clean Air Act, 42 U.S.C. 7401, et seq., as amended through November 15, 1990, and in this rule. The definitions set forth in 40 CFR Part 72 as amended through January 24, 2008, and 40 CFR Part 76 as amended through October 15, 1999, are adopted by reference. Any terms and definitions referring to the Clean Air Interstate Rule or CAIR are not adopted by reference.

**ITEM 3.** Amend paragraph 23.1(2)"z" as follows:

z. Electric utility steam generating units. An electric utility steam generating unit that is capable of combusting more than 250 million Btus per hour (73 megawatts) heat input of fossil fuel for which construction or modification or reconstruction is commenced after September 18, 1978, or an electric utility combined cycle gas turbine that is capable of combusting more than 250 million Btus per hour (73 megawatts) heat input. An electric utility steam generating unit is any fossil fuel-fired combustion unit of more than 25 megawatts electric (MW) that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 MW output to any utility power distribution system for sale is also an electric utility steam generating unit. ~~This standard also includes a provision for mercury emissions for any coal-fired electric utility steam generating unit other than an integrated gasification combined cycle electric steam generating unit, for which construction or reconstruction commenced after January 30, 2004.~~ (Subpart Da)

**ITEM 4.** Amend subrule 23.1(4) as follows:

**23.1(4)** Emission standards for hazardous air pollutants for source categories. The federal standards for emissions of hazardous air pollutants for source categories, 40 Code of Federal Regulations Part 63 as amended or corrected through April 8, 2008, are adopted by reference, except those provisions which cannot be delegated to the states. The corresponding 40 CFR Part 63 subpart designation is in parentheses. An earlier date for adoption by reference may be included with the subpart designation in parentheses. 40 CFR Part 63, Subpart B, incorporates the requirements of Clean Air Act Sections 112(g) and 112(j) and does not adopt standards for a specific affected facility. Test methods (Appendix A), sources defined for early reduction provisions (Appendix B), and determination of the fraction biodegraded (Fbio) in the biological treatment unit (Appendix C) of Part 63 also apply to the affected activities or facilities. For the purposes of this subrule, "hazardous air pollutant" has the same meaning found in 567—22.100(455B). For the purposes of this subrule, a "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless a lesser quantity is established, or in the case of radionuclides, where different criteria are employed. For the purposes of this subrule, an "area source" means any stationary source of hazardous air pollutants that is not a "major source" as defined in this subrule. Paragraph 23.1(4)"a," general provisions (Subpart A) of Part 63, shall apply to owners or operators who are subject to subsequent subparts of 40 CFR Part 63 (except when otherwise specified in a particular subpart or in a relevant standard) as adopted by reference below. ~~The provisions of 40 CFR Part 60, Subparts A, B, Da, and HHHH for the~~

~~Clean Air Mercury Rule (CAMR), are found at subrules 23.1(2) and 23.1(5) and in 567—Chapter 34.~~

**ITEM 5.** Amend paragraph 23.1(4)"dd" as follows:

dd. Emission standards for industrial, commercial and institutional boilers and process heaters. These standards apply to new and existing major sources with industrial, commercial or institutional boilers and process heaters. ~~For purposes of these standards, a boiler is defined as an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Waste heat boilers, as defined in the federal rule, are excluded from these standards. For purposes of these standards, a process heater is defined as an enclosed device using controlled flame, that is not a boiler, and the unit's primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to a heat transfer material for use in a process unit, instead of generating steam. Process heaters are devices in which the combustion gases do not directly come into contact with process materials. Process heaters do not include units used for comfort or space heat, food preparation for on-site consumption, or autoclaves.~~ (Part 63, Subpart DDDDD)*

*<u>As of [insert effective date of rule], Part 63, Subpart DDDDD, is not adopted by reference. On July 30, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart DDDDD, in its entirety, and required EPA to re-promulgate final standards for industrial, commercial or institutional boilers and process heaters at new and existing major sources.</u>

**ITEM 6.** Amend paragraph 23.1(4)"dj" as follows:

dj. Emission standards for hazardous air pollutants for brick and structural clay products manufacturing. These standards apply to new and existing brick and structural clay products manufacturing facilities that are, are located at, or are part of a major source of hazardous air pollutant emissions. ~~The brick and structural clay products manufacturing source category includes those facilities that manufacture brick including, but not limited to, face brick, structural brick, and brick pavers; clay pipe; roof tile; extruded floor and wall tile; or other extruded, dimensional clay products. Additional applicability criteria and exemptions from these standards are contained in the applicable subpart.~~ (Part 63, Subpart JJJJJ)**

**As of [insert effective date of rule], Part 63, Subpart JJJJJ, is not adopted by reference. On June 18, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart JJJJJ, in its entirety, and required EPA to re-promulgate final standards for brick and structural clay products manufacturing at new and existing major sources.

**ITEM 7.** Rescind paragraph 23.1(5)"d."

**ITEM 8.** Rescind rule 567—25.3(455B).

**ITEM 9.** Rescind rules 567—34.2(455B) through 567—34.308(455B), including Tables 1A, 1B, 2A, 2B, 3A and 3B, and **add** the following **footnote**:

*As of [insert effective date of rule], the requirements for the Clean Air Interstate Rule (CAIR) and Clean Air Mercury Rule (CAMR) are rescinded and all federal regulations associated with CAIR and CAMR are not adopted by reference. The United States Court of

Appeals for the District of Columbia Circuit vacated the federal CAIR and CAMR regulations in their entirety,

_____
Date

_____
Richard A. Leopold, Director

Attachment – Background Document

September 22, 2008

# CAIR and CAMR

## CAIR & CAMR Regulations

EPA promulgated the Clean Air Interstate Rule (CAIR) in May 2005 to address interstate transport of sulfur dioxide ($SO_2$) and nitrogen oxide ($NO_x$) emissions from eastern and midwestern states, including Iowa, which were found to contribute to unhealthy levels of fine particles and ozone in downwind states. The first phase of CAIR was to begin in 2009. The second phase was to begin in 2015.

In May 2005, EPA also promulgated the Clean Air Mercury Rule (CAMR). The purpose of CAMR was to permanently cap and reduce mercury emissions from coal–fired electrical steam generating units (EGUs). The first phase of CAMR was to begin in 2010. The second phase of CAMR was to begin in 2018.

With the assistance of a CAIR-CAMR stakeholder workgroup, the Department chose to adopt EPA's cap and trade programs for regulating $NO_x$, $SO_2$ and mercury emissions from EGUs. EPA subsequently approved the state's CAIR and CAMR regulations into Iowa's State Implementation Plan (SIP) in 2007.

Under the CAIR cap and trade program, the Department provides $NO_x$ allowances and EPA provides $SO_2$ allowances to each affected EGU. Each allowance is equal to one ton of emissions. Upon allocation of $NO_x$ and $SO_2$ allowances, EGUs can then trade them through an EPA–managed trading program. At the end of each year, each affected EGU must hold one allowance for each ton of $SO_2$ or $NO_x$ emitted.

Under the CAMR cap and trade program, EPA provides the state with a "budget" of mercury allowances, which the Department then allocates to each affected coal-fired EGU. Each allowance is equal to one ounce of mercury emissions. Upon allocation of mercury allowances, coal-fired EGUs can then trade them through an EPA–managed trading program. At the end of each year, each affected EGU must hold one allowance for each ounce of mercury emitted.

Neither CAIR nor CAMR were intended to reduce emissions at specific EGUs, but instead were intended to guarantee national emissions reductions. The EGUs were allowed the flexibility to determine the most appropriate method of compliance by securing allowances, reducing emissions, or instituting some combination of these approaches.

## CAIR and CAMR Vacaturs

The D.C. Court issued its decision to vacate CAMR on February 8, 2008, and issued the mandate making the decision final and effective on March 14, 2008. The D.C. Court's decision is available on-line at http://pacer.cadc.uscourts.gov/docs/common/opinions/200802/05-1097a.pdf

The D.C. Court issued its decision to vacate CAIR on July 11, 2008. The D.C. Court has not yet issued the mandate on the decision. The Department can provide a copy of the 60-page decision, upon request (the decision is not yet posted on the D.C. Court's general-access website)

Although both of the CAIR and CAMR vacaturs are at various points in the federal court system, it does not appear that EPA will be operating the CAIR and CAMR trading programs, at least not as originally planned. Other federal CAIR and CAMR regulations separate from the trading programs were also vacated in the D.C. Court's decisions. As such, the Department is proposing to remove the state air quality rules for CAIR and CAMR.

## Air Toxics Regulations Impacting Boilers and Brick &Clay Manufacturing

MACT Regulations

Section 112 of the Clean Air Act (CAA), as amended in 1990, requires EPA to develop a list of source categories or subcategories that emit, or have the potential to emit, Hazardous Air Pollutants (HAP), and to issue regulations for these source categories or subcategories. Section 112 also requires certain subject sources to meet Maximum Achievable Control Technology (MACT) for controlling HAP.

EPA issues the MACT standards for listed source categories and subcategories under the National Emissions Standards for Hazardous Air Pollutants (NESHAP) program. EPA promulgated the NESHAP with MACT standards for brick and structural clay products manufacturing (Brick MACT) on May 16, 2003. EPA promulgated the NESHAP with MACT standards for institutional, commercial and industrial boilers and process heaters (Boiler MACT) on September 13, 2004. The Brick MACT and the Boiler MACT are adopted by reference into the state air quality rules.

CAA Sections 112(g) and 112(j)

Section 112 of the CAA includes provisions to require MACT for major sources of HAP emissions in the event that EPA does issue MACT standards. Under section 112(g), if EPA has not set applicable emission limits for a category of listed HAP sources, construction of a new major source or modification of an existing major source in the source category may not occur unless the Administrator (or delegated state or local agency) determines on a case-by-case basis that the unit will meet standards equivalent to MACT. Under CAA section 112(j), if EPA fails to promulgate a standard for a listed category or subcategory by the dates established in the CAA, states must conduct a case-by-case MACT determination for each subject source category or subcategory and include the MACT requirements in each facility's Title V Permit. EPA has delegated authority to the Department to implement and enforce both 112(g) and 112(j) in Iowa.

MACT Vacaturs

The D.C. Court issued its decision to vacate the Brick MACT on March 13, 2007, and issued the mandate making the decision final and effective on June 18, 2007. The D.C. Court's decision is available on-line at http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/03-1202a.pdf

The D.C. Court issued its decision to vacate the Boiler MACT on June 8, 2007, and issued the mandate making the decision final and effective on July 30, 2007. The D.C. Court's decision is available on-line at http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/04-1385a.pdf

Because of the D.C. Court vacaturs, it appears that sections 112(g) and 112(j) apply to sources affected by the now vacated Boiler and Brick MACTs. It also appears that section 112(g) applies to new EGUs. As part of the D.C. Court's decision to vacate CAMR, the D.C. Court found that EPA failed to follow the comprehensive de-listing process for EGUs required under section 112. However, section 112(j) does not apply to EGUs at this time because it was not among the source categories listed by EPA when it implemented section 112 and the MACT program.

## Department Activities

At the Air Quality Client Contact meeting on August 14th, the Department discussed the implications of the CAIR and CAMR vacaturs with stakeholders. The Department also outlined a tentative, section 112(j) timeline for owners and operators of facilities with boilers and process heaters, and sent a letter to affected facilities on September 16th.

The Department plans to form an implementation workgroup in late winter or early spring of 2009 to develop section 112(j) requirements for boilers and process heaters. Proposed rule changes to implement section 112(j) may be initiated as a result of the workgroup activities. If EPA fails to re-promulgate final MACT standards for boilers-process heaters by the applicable section 112(j) deadlines, the Department may be required to finalize the state MACT standards.

Since only three brick and structural clay products manufacturing facilities exist in the state, the Department will be working with these facilities individually to develop the 112(j) requirements, as appropriate.

During the rulemaking process to remove the vacated federal regulations from state air quality rules, the Department will continue to closely monitor EPA and federal court actions, and, if needed, will alter its proposed rulemaking and implementation strategies.